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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 430

SAM ACHILLI, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your *amicus curiae* has heretofore on March 21st, 1957, filed a motion for leave to file this brief; however, since such motion will not be acted upon before the due date of petitioner's brief, that is, March 30th, this brief is lodged with the Clerk within such date, in order that it may be considered filed when, as and if permission is granted.

INTEREST OF AMICUS CURIAE

Your *amicus curiae* was Chief Counsel in filing the petition for Certiorari in the case at bar; and, upon denial of such petition on November 19, 1956, and remand to the District Court, withdrew from active participation in the case. Upon receipt of order of this Court dated March 4, 1957, vacating its order of November 19, 1956, your *amicus curiae* filed a motion to withdraw in order to conform to the wishes of the client and new counsel; and

Your *amicus curiae* has raised the same issue before the District Court of the United States for the Northern District of Ohio, Western Division, in the cases of the *United States of America* v. *C. O. Hanson* (Docket Nos. 21911, 21912) now pending before Judge Weick on motions in arrest of Judgment, for Judgment of Acquittal, and for a New Trial. In the *Hanson* case all the objections inherent in the issue were raised before trial, during trial and after trial; a situation that is not as clear in the *Achilli* or *Costello* cases.

SUMMARY OF ARGUMENT

Succinctly stated, it is the contention of this *amicus curiae* that Section 3616 (a) (a misdemeanor) and Section 145 (b) (a felony) of the Internal Revenue Code of 1939 are both in full force and effect; and both apply to income tax violations. However, where the crime fits the requirement of the felony charge, the aggravating elements must be stated in the indictment—otherwise the indictment charging violation of the felony statute is invalid and cannot stand as a misdemeanor unless such crime is charged in another count.

The rule that the incorrect citation of a statute in an indictment does not void such indictment has no application where a crime may be either a misdemeanor or a felony depending upon the elements composing the crime. Where the elements fit one or the other statute, the citation of the statute does attain a significance; and, to cite the felony statute where only the misdemeanor elements are charged is fatal. It constitutes an election that is binding; and, if the alternative is desirable, then the misdemeanor must be set forth in another count (Rule 8 (a) F.R.C.P.) of the indictment.

Here, the charging part of the indictment charges:

> "filing and causing to be filed . . . a false and fraudulent income tax return. . . ."

which comes squarely within the provisions of Section 3616 (a) of the Code, whereas Section 145 (b) of the Code provides that one who

> "willfully attempts *in any manner* to evade or defeat any tax. . . ." (italics supplied)

is guilty of a felony.

In our opinion "in any manner" embraces more than a "false and fraudulent" return; and that such further elements must be charged in the indictment.

ARGUMENT

(A) BOTH SECTIONS OF LAW APPLY TO INCOME TAX VIOLATIONS

We will not stop to trace the history of Sections 145 (b) and 3616 (a) of the Internal Revenue Code of 1939—that will be adequately covered in briefs by the parties.

We do, however, remind the Court that the Government has maintained prosecutions under each of such sections since the Internal Revenue Code of 1939 was adopted; and, as recently as March 1956 maintained the position that both sections were applicable to income tax violations before this Court in *Berra* v. *United States of America*, 351 U.S. 131, 133. Now the Government questions the soundness of its position in *Achilli* v. *United States of America* (Docket 834).

Congress included both sections of law when it enacted the Internal Revenue Code of 1939. The contention has been made that this was error—that Section 3616 (a) had been repealed by implication when Section 145 (b) was enacted and repeatedly re-enacted.

We do not believe this to be so; however, assuming arguendo that there was error, the fact remains that Congress by enacting the Internal Revenue Code of 1939 did enact both sections—that became the law of the land from that moment. Omissions from the Code it could be argued were error and should not be considered repealed; but affirmative action by enactment is not error—it becomes the law.

The existence of the two sections should cause no confusion nor is one repugnant to the other; the misdemeanor statute, Section 3616 (a), provides for one crime, that of filing a false and fraudulent return; the other, a felony statute, Section 145 (b), provides for a crime comprising aggravating elements; for example, maintaining a duplicate set of books, maintaining false books, obstructing the investigation of the return filed, concealing assets, or making false statements after the return is filed.

The crime encompassed by Section 3616 (a) is completed when the return is filed; whereas, the crime under Section 145 (b) may be incomplete on the filing date, but completed later.

The above examples clearly demonstrate that the same proof is not necessarily required for a prosecution under one section as would be required under the other section. Under Section 3616 (a) the charge would be the filing of a false and fraudulent return and proof of that fact. Under Section 145 (b) the charge would be more than the filing of a false and fraudulent return, the other elements—whatever device is availed of—must be charged and proven.

(B) ELECTION TO INDICT AND PROSECUTE AS A FELONY

A United States Attorney confronted with an income tax violation, upon examination of the evidence, has one of three choices to make; depending upon which the evidence fits; that is:

(1) Proceed under Section 3616 (a) as a misdemeanor;

(2) Proceed under Section 145 (b) as a felony; or

(3) In separate counts in the indictment proceed under both statutes.

The decision based upon what the prosecution can prove is not one based upon discretion but on proof. It does not repose in the prosecution an arbitrary power over the liberty of a defendant. He very simply determines which crime has been committed and proceeds to procure an indictment and prosecutes under the applicable statute, or both.

However, having made his choice and the Grand Jury indicting, he is bound by such choice or election. The indictment must meet the test of charging the offense chosen. If, for purposes not disclosed, he and the Grand Jury elect the felony charge instead of the misdemeanor charge or both in separate counts, then the indictment must measure up to the required felony elements. It will not do later to claim an error was committed, or that the citation of the statute was in error. There is no error of judgment respecting which statute to invoke. The choice of statute is deliberate and is binding. If the indictment then fails to measure up to the required felony elements and no misdemeanor count was included as a safeguard, the indictment is defective and invalid. As this Court said in *Rosenburg* v. *United States* (opinion of Mr. Justice Clark) 346 U.S. 273, 294:

> "Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law: 'At least where different proof is required for each offense, a single act or transaction may violate more than one criminal statute.'" (citing cases)

Here, then, the felony statute was selected and no misdemeanor statute was included as a separate count. The indictment, if it fails to measure up to the felony requirements by failure to charge the elements necessary to raise the misdemeanor to the felony stature, must fail. The filing of a false and fraudulent income tax return is a misdemeanor punishable under Section 3616 (a). The willful attempt in any manner to evade or defeat any tax is a felony. The felony is an

Aggravation of Offense

and the aggravation must be charged in the indictment. By aggravation of offense we do not mean the amount of tax involved, we mean additional elements of the crime, which by such additions create a felony of what otherwise would be a misdemeanor.

The aggravating elements must be contained in the indictment; otherwise it is invalid—invalid as a felony, and not susceptible to reduction to a misdemeanor because a felony is charged.

In *Aderhold, Warden* v. *Pace* (65 F. 2nd 701) (1933) (5 CCA)—a liquor case under the prohibition law, it was a misdemeanor to sell a quantity of less than a gallon, but a felony if the quantity sold amounted to more than a gallon—the Fifth Circuit stated: (p. 791)

> "Any aggravation of an offense for which the law authorizes an increase in punishment must be stated in the indictment. 1 Bishop's Cr. Law, Sec. 601. Mr. Bishop also says that to punish one for all of a crime where only a part of it is charged is to punish him without accusation. 1 Bishop's Cr. Pro. Sections 77, 80, 84. So far as we are aware, there is no authoritative decision to the contrary. Certainly it cannot fairly or justly be said that Pace, because he pleaded guilty to a charge of selling an unnamed quantity of intoxicating liquor, thereby admitted he had sold more than a gallon."

The above case arose by appeal from an order granting a writ of habeas corpus and discharging a prisoner who had pleaded guilty and had been sentenced under the felony statute. After serving the misdemeanor penalty the writ was applied for and the prisoner dicharged.

In *Martin* v. *United States* (99 F. 2nd 236) (1938) (10 CAA), also a liquor case, the Court affirmed the conviction, on the grounds that the sentence was within the limits of the particular statute. In its opinion, the Court said:

> "The offense laid in an indictment is charged by the allegations of fact, not by reference to statutes. *If reference to a statute is essential* for the reason that the indictment does not make sense or is lacking in necessary allegations without it, *an incorrect reference may be fatal.* But where an offense is otherwise sufficiently charged, an incorrect reference to a statute does not render the indictment invalid." (Italics supplied)

In *United States* v. *Berkowitz* (45 Fed. Supp. 564) (D.C.W.D. Mo. W.D.) (1942) the Court after citing and quoting from *Ruling Case Law*, Vol. 14, Sec. 55; *24 Corpus Juris Secundum, Criminal Law, Sec.* 1580, Page 100; the same volume Sec. 1962, page 1156, 31 C.J. Sec. 282, p. 734; *Olivito* v. *U.S.* (67 F. 2nd 564, 565) 9 CCA: *Aderhold* v. *Pace,* (supra) 65 F. 2d 790, 791; held: (p. 565)

> "In view of the foregoing authorities, and, in the absence of contrary ruling, it should be held that under said Section 216, 29 U.S.C.A., supra, an imprisonment penalty cannot be imposed except in those cases where a second offense has not only been committed, but where the indictment or information charges the fact.

In *Olivito* v. *United States* (67 F. 2nd 564) (1933) (9 CCA) the appellant prayed the case be remanded so that a new appropriate sentence be passed. The Court did so; and stated:

> "It is true ordinarily an indictment is not required to negative the cases falling under a proviso of an

> enactment. But here, definite lesser maximum penalties were provided for minor offenses, patently marking these acts as misdemeanors. Foster v. U.S. (CCA 7) 47 F. (2d) 892; Aderhold, Warden v. Pace (CCA 5) 65 F. (2d) 790, 791. It is also set out that if certain characteristics are added to these acts they fall under the brand of felonies. Under such circumstances, it is certain that the indictment should allege, in order to invoke the heavier penalty, that the sale was of a quantity more than a gallon.
>
> * * * * * * * * * *
>
> It is true the court may have had at hand other facts, not shown by the record, tending to establish habitual violation; but under the present law the discretionary power has been removed and the court is empowered to sentence only upon the findings of a jury, based upon appropriate allegations of the indictment."

Meyers v. United States (116 F. 2nd 601) (1941) (5 CCA) states (p. 603)

> "The facts constituting such aggravation of a crime as will increase the statutory punishment must be plainly charged or they are not confessed by a plea or established by a verdict of guilty. Aderhold, Warden v. Pace, 5 Cir., 65 F. 2nd 790."

There the defendant entered a plea of guilty, and while serving sentence for bank robbery and assault in the course thereof, the prisoner appealed. The statute cited in the indictment covered two offenses, one incurring a penalty of twenty years imprisonment, the other set the maximum penalty at twenty-five years. The Court had pronounced the greater sentence. The Fifth Circuit remanded for resentencing because the indictment charged only the lesser offense.

In *Jordan* v. *United States* (233 F. 2nd 362) (D.C. Appeals) (1956) the crime charged fitted section 22-501 of the D.C. Code although the indictment does not appear to set forth the citation of the statute (footnote 4, page 366). The proof showed the defendant was armed and on conviction a greater sentence was imposed under section 22-3202. The Court in remanding directed the vacation of the existing sentence and that the prisoner be resentenced under the lesser penalty statute, in distinguishing its holding from an earlier decision in another case, it stated: (p. 367)

> "On the other hand, where the aggravation arises from the manner in which the crime was committed, in substance a different aspect of the offense is sought to be punished. Accordingly, we think—as did the Fifth Circuit in the Meyers case—that *the facts in aggravation must be charged in the indictment* and found to be true by the jury. The sentence here imposed was accordingly erroneous. It must be vacated and a new and proper sentence imposed." (footnotes omitted) (Italics supplied)

In *U.S.* v. *McCulloch* (6 F.R.D. 559) (D.C. N.D. Ind. Fort Wayne Div.) (1947) the Court dismissed an indictment charging possession of three cartons of cigars, moving in interstate commerce, knowing the cigars to have been stolen. The statute (Sec. 409, Title 18, U.S.C.) described the mode of moving in interstate commerce, as railroad car, motortruck, wagon or other vehicle; station house, platform, depot, or terminal; steamboat, vessel or wharf; aircraft, airport, aircraft terminal, or air navigation facility. The indictment charged possession, moving in interstate commerce and that the cigars were stolen. In dismissing the Court said: (560)

"The indictment in this case does not contain all of the essential facts constituting the crime charged. That is, it does not charge that the goods were obtained from any of the places or facilities of transportation enumerated in the statute. Such omission is fatal. United States v. Cohen, 3 Cir., 274 F. 596; Wolkhoff v. United States, 6 Cir., 84 F. 2nd 17.

The motion to dismiss is well taken for an added reason. Justice Holtzoff in United States v. Starks, 6 F.R.D. 43, restates the general rule as to indictment, as follows:

'First, it must apprise the defendant of the specific offense with which he is charged. * * * The second test is that the indictment must be sufficiently definite in order that if the defendant is later charged with the same offense he will be in a position to interpose a plea of double jeopardy.'

The indictment under consideration does not meet these tests because it does not identify the stolen goods with sufficient definiteness. Allegations of ownership or other averments tantamount to identify by ownership are essential. Kasle v. United States, 6 Cir. 233 F. 878; Block v. United States, 5 Cir., 261 F. 321, 322."

and in disposing of the Government's contention that the indictment meets the requirements of Rule 7(c) of the Rules of Criminal Procedure, the Court states: (p. 560)

"There is no doubt that this rule was designed to bring about a simple form of indictment. Its purpose was to do away with the redundancy and verbiage which needlessly burden many indictments under the former practice. On the other hand *it did not change the essential requirements of a valid* indictment." (Italics supplied)

Wolkoff v. *U. S.* (84 F. 2nd 17) (6 CCA) (1936) brings into sharp focus the effect of an invalid and a valid indictment. There the defendant was tried by the Court; and the Court without rendering a decision, dismissed the case upon the grounds that the indictment was faulty, since it did not designate the place or vehicle from which the goods were stolen.

Upon reindictment, the defendant pleaded former jeopardy. The Court overruled and the Sixth Circuit affirmed on the grounds that since the first indictment was invalid there was no double jeopardy.

In *U. S.* v. *Standard Brewery, Inc.* (251 U.S. 210) (1920) this Court affirmed the decision of the lower court holding indictments invalid. The cases arose under the prohibition laws; and the Treasury Department by regulation held a beverage containing one-half of one per cent of alcohol to be intoxicating. In affirming the dismissal this Court said: (p. 220 U.S. Reports)

> "An indictment must charge each and every element of an offense, Evans v. United States, 153 U.S. 584, 587, 14 Sup. Cit. 934, 38 L. Ed. 830. We cannot say, as a matter of law, that a beverage containing not more than one-half of 1 per cent of alcohol is intoxicating, *and as neither indictment so charges* it follows that the courts below in each of the cases correctly construed the act of Congress and the judgments are affirmed." (Italics supplied)

Here, Section 145 (b) imposes a felony penalty on anyone who willfully attempts in any manner to evade or defeat any tax but the indictment charges only the offense punishable under Section 3616 (a)—the aggravating elements are not charged.

It is important to note that this Court in *Berra* v. *U. S.* (351 U.S. 131) states: (132, 133)

> "No motions addressed to the validity of the indictment, judgment of conviction, or sentence under Section 145 (b) were made before, during, or after trial, and we read the requested instruction as aimed at leaving to the jury the question of whether the defendant should be convicted under Section 145 (b) or Section 3616 (a), if the jury found him guilty."

Here, by motion, the defendant did question the validity of the indictments.

CONCLUSION

Your *amicus curiae* suggests that this Court in construing Sections 145 (b) and 3616 (a) of the Internal Revenue Code will conclude: that both sections of the Code, that is Sections 145 (b) and 3616 (a) are in full force and effect and that both are applicable to income tax violations; that an indictment under Section 145 (b) to be valid must set forth the aggravating elements necessary to raise the violation from a misdemeanor to a felony; and that the election to indict and prosecute as a felony precludes a trial under the misdemeanor statute unless a separate misdemeanor count is included in the felony indictment.

WHEREFORE, it is prayed that this Court will set at rest the law on all phases of the issue presented.

Respectfully submitted,

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